IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1513

RICHARD J. TALSKY,

Petitioner,

vs.

DEPARTMENT OF REGISTRATION AND EDUCATION, STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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CITATIONS AND EXHIBITS

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Petitioner, Richard J. Talsky, chiropractor, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court entered in this cause.

OPINION BELOW

The Illinois Supreme Court's judgment was entered on October 5, 1977. This case is reported in 68 Ill. 2d 579, and 12 Ill. Dec. 550, 370 N.E. 2d 173 (1977).

JURISDICTION

The Illinois Supreme Court's judgment was entered October 5, 1977. Rehearing denied November 23,

1977. Time was extended on March 6, 1978 by Mr. Justice Stevens to and including April 22, 1978 to file a petition for a writ of certiorari in this case. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Can the State of Illinois, through the Department of Registration and Education, prohibit the dissemination of information concerning professional services, fees, expertise and credit arrangements by Richard Talsky, D.C., in contravention of his rights pursuant to the First Amendment to the United States Constitution and pursuant to Article I, §4 of the Constitution of 1970 of the State of Illinois?

2. Does the advertising prohibition of the Illinois Medical Practice Act (Ch. 91, §16a13, Ill. Rev. Stat.) contravene and infringe the guarantees of equal protection of law and due process of law secured to Richard Talsky, D.C.?

THE PROHIBITION INVOLVED

Illinois Annotated Statutes, Ch. 89-92 p. 24, §16a, p. 26 §13, p. 38 §16a-1:

§16a. Revocation and suspension of license or certificate - Grounds - Limitation - Insanity - Resumption of practice on restoration

The Department may revoke, suspend, place on probationary status, or take any other disciplinary action as the Department may deem proper with regard to the license, certificate or state hospital permit of any person issued under this Act or under any other Act in this State to practice medicine, to practice the treatment of human ailments in any manner or to practice midwifery, or may refuse to grant a license, certificate or state hospital permit on a probationary status subject to the limitations of the probation, and may cause any license or certificate which has been the subject of formal disciplinary procedure to be marked accordingly on the records of any county clerk upon any of the following grounds.

* * *

4. Engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public.

* * *

13. Except as otherwise provided in Section 16.01,* advertising or soliciting, by himself or through another, by means of handbills, posters, circulars, stereoptican slides, motion pictures, radio, newspapers or in any other manner for professional business;

* * *

*16a-1. Listing of name, title, etc.

Any person licensed under this Act may list his name, title, office hours, address, telephone number and any specialty in professional and telephone directories; may announce, by way of a professional card not larger than 3½ inches by 2 inches, only his name, title, degree, office location, office hours, phone number, residence address and phone number and any specialty; may list his name, title, address and telephone number and any specialty in public print limited to the number of lines necessary to state that information; may announce his change of place of business, absence from, or return to business in the same manner; or may issue appointment cards to his patients, when the information thereon is limited to the time and place of appointment and that information permitted on the professional card. Listings in public print, in professional and telephone directories, or announcements of change of place of business, absence from, or return to business, may not be made in bold faced type.

1923, June 30, Laws 1923, p. 436 §16.01, added 1967, July 18, Laws 1967, p. 1763, §1.

STATEMENT OF THE CASE

Following a hearing held and recommendations made by the Medical Examining Committee of the Respondent, the Department of Registration and Education of the State of Illinois, through its Director, ordered a 90 day suspension of the Petitioner's license to practice chiropractic.

After exhausting all prescribed administrative remedies and being denied a rehearing, the Petitioner, Richard Talsky, chiropractor, prayed for judicial review of the decision of the Respondent on the grounds that Ch. 91 §16a(4) and (13), Ill. Rev. Stat. is unconstitutional on its face and as applied as violative of the First and Fourteenth Amendments to the United States Constitution. The Petitioner prayed further that the record be reviewed and the decision reversed.

It was also alleged by the Petitioner at that time that the Medical Examining Committee through their conduct of the administrative hearing continuously denied the Petitioner due process of law and effective assistance of counsel by their rulings and decisions. Said violations of the Petitioner's rights are contained in the transcript of the hearing.

One such violation was their ruling to allow the admission into evidence, in whole, of the transcript of a previous hearing held on the same issues, where the Petitioner and counsel were not present. This ruling served as the direct examination in the second (final) hearing of the Respondent's case, and the Petitioner's attorney had to cross-examine <u>through</u> the transcript.

Included in the balance of six district claims to support reversal of the administrative decision was the claim by the Petitioner that the amended

complaint brought by the Respondent in the Administrative action failed to state a cause of action in that it did not set forth facts that what the Petitioner had been alleged to have done was of a nature "likely to deceive, defraud or harm the public."

Administrative action began almost three years before the first formal administrative hearing following the placing of an announcement of an open house at the Petitioner's chiropractic office on the occasion of the second anniversary at that location and in the community. This announcement was placed in the community newspaper, The Cicero, Berwyn, and Stickney Life Newspapers. This announcement was also used as an opportunity to make a public statement to the community in the form of an open letter. In the text of this statement which accounted for at least fifty percent of the space of the entire communication was an expression of considerable concern about the health and welfare of the community and the American public as a whole. Such serious health concerns had troubled the Petitioner increasingly over the five years theretofore he had been in practice. This statement paid for in public print was the first effective opportunity that occurred to the Petitioner, who at that time was inexperienced in the area of public information. It appeared to him to be a natural and legitimate means to express a vitally important message of great potential interest to consumers of health services.

The subject of the message as shown in the enclosed exhibit **(pp. 13a, 14a, 15a,)**
was the problem with an increasing number of Americans, that of drug dependency. The message described in detail how increasingly our culture had become each year ever more reliant on drugs, chemicals, and medication for the day to day simulation of a feeling of well-being in every aspect of our daily life, and the financial and human cost it was exerting on us. This open letter was not referring

to the much more limited "underground" drug problem of so-called hard drugs, but rather to the situation that leads to it, the general acceptance of drugs and chemicals for the routine "relief" of everyday discomforts of living. What was already a serious situation in 1972, when this message was published, is far more pervasive a social and health problem today.

Composing this message for the public was in response to the perception by the Petitioner of a great need to alert the community to the presence of this widespread, yet insidious, situation spreading across the country, threatening to erode the overall health of our society as a whole. Unfortunately, this perception and announcement proved to be accurate, and despite how alarmist it may have sounded in 1972, it is becoming alarmingly apparent as fact today. What apparently appeared to be an indiscreet and possibly "unprofessional" public statement to a neighboring chiropractor served as motivation to turn in a complaint initiating the administrative action by the Respondent.

At first the Respondent used intimidation at an informal hearing and in repeated harassing visits to the Petitioner's office, both during times he was serving patients and at other times, in an effort to dissuade him from not only repeating the alleged offense, and repeat it he did not, but also common practices such as making available health information pamphlets, signs (within the office) and even written communication by mail to his own patients. The Respondent later admitted by correspondence that these common practices previously discouraged were, in fact, not prohibited at all. This letter followed the Petitioner's consent during an informal hearing following the incident, not to repeat similar publishing of such public messages.

At no time after that, despite numerous efforts, was the Petitioner able to determine from the Respondent just what form of public communication was

legitimate, legal, and allowable. For nearly three years the Petitioner was effectively intimidated from making any effort to inform the public in mass for fear of being sanctioned, punished, and losing for a time his right to practice his profession.

Finally, after a long period of personal frustration, during which countless individuals came into his office for care after needlessly waiting, suffering out of ignorance alone, ignorance of effective alternative help for their health problem, help that could have been easily accessible to them if only the Petitioner had the opportunity to inform his community as a whole, inform them through the vehicle of the press; further frustrated by observing the inequity of the public information (propaganda) and public relations machine of the American Medical Association and its subservient state medical societies often used in a subversive manner to slander and demean competing health services repressively and in restraint of trade. Such restraints are now being well documented in a pending class action anti-trust suit brought by five chiropractors against the A.M.A. Note, also, the numerous state anti-advertising bans within health profession regulations clearly inspired by the A.M.A. anti-competitively, as charged and documented by the Federal Trade Commission.

At that time, nearly three years following the "announcement incident" the Petitioner was further becoming frustrated by the inequities he saw in hospital (competing medical health services) public relations campaigns inducing utilization of their health services with free screening tests, and advertisements which were just beginning at that time for medical services in clinics in the form of elective abortions and medical abortion counseling, often for a fee. Such ads seemed often not only flamboyant, but often cheaply pandering to the desperate situation of an "unwanted" pregnancy This was frustrating to the Respondent because in his sincere and apparently legitimate

effort to inform, he had been so rapidly and so effectively repressed. What logical basis could there be for such a double standard?

As a safety valve, to relieve the frustration to his personal expression and fulfill the powerful need he felt to inform his community, the Petitioner printed a small number of broadsides and posted them publicly in the neighborhood. Mindful of the narrow restrictions of the advertising law, but still in the dark as to what would be legal communication, the Petitioner, at much personal risk (clearly not realizing how much) posted these broadsides, being careful not to include any references to himself, personally. It was clearly a non-soliciting public information piece. At no time was it established, or even specifically alleged, that the Petitioner was even in any way responsible for the broadsides. This could not be determined without question, unless the Petitioner was at least asked about it. To date, this had not been done. Further, cited in the informal administrative compiaint was the posting of business cards in a tear-off fashion on the outer window of the Petitioner's office. This action and the public posting of a help-wanted flyer, also cited in the administrative complaint, seem to have little or no connection with the wording of the advertising ban in the involved statute. Certainly, these two examples are clear illustrations of how a vague and broadly worded statute can be applied repressively, particularly when it infringes on constitutionally protected speech, IN AN ARBITRARY MANNER, without well established enforcement standards, and interpreted by administrators unsophisticated in interpreting First Amendment constitutional protections.

The hearing of these issues was further prejudiced by the inherent conflict of interest situation of the counsel for the Medical Examining Committee serving the dual role of being advisor to the Committee as well as serving as the unbiased arbitrating

interpreter of the conclusive meaning of administrative rules and procedures used in the administrative hearing. As shown in the hearing transcript, this conflict of interest compromised the due process interests of the Petitioner in a number of instances.

In the judicial review, the trial judge apparently disregarded all of these contentions and focused solely on the First Amendment question. His decision supported the Petitioner's contention that the law was overbroad, thus unconstitutional, and was grounds for reversing the administrative decision ordering suspension of the Petitioner's license to practice chiropractic for 90 days.

The Respondent carried an appeal of this decision to the Illinois Supreme Court. In the majority opinion of five of the seven Justices, the communications in question were adjudged as "uninformative and misleading" and "they were not entitled to First Amendment protection within the purview of the Virginia Citizens and Bates decisions."

REASON FOR GRANTING THE WRIT

I. THE REVIEWING COURT, THE ILLINOIS SUPREME COURT, HAS MISAPPREHENDED THE SCOPE OF ITS RESPONSIBILITY ON REVIEW OF THE JUDGMENT BELOW.

This appeal came to the Supreme Court upon the entry of a summary judgment order in favor of the Plaintiff-Appellee holding the provisions of the Medical Practice Act of Illinois pertaining to professional advertising unconstitutional as overbroad. The matter had come before the trial court upon the Plaintiff-Appellee's complaint in an administrative review action pursuant

to Ch. 110, §264 et seq., Ill. Rev. Stat. The proceedings in the trial court were commenced by a multi-count complaint raising six distinct claims to justify and support the reversal of the underlying administrative decision suspending the Plaintiff-Appellee for engaging in professional advertising. (Excerpts of Record, C-2). The Department of Registration and Education of the State of Illinois had entered certain findings of fact which were challenged in the Complaint for Administrative Review. (Excerpts of Record, C-171). Those findings of fact went no further than to stipulate that the Plaintiff-Appellee had engaged in advertising. They in no way addressed the substance or manner of advertising. The trial court order was entered at a preliminary stage and was entered without a full review of the entire record in the administrative proceedings. It constituted the entry of summary judgment solely on Count I of the Complaint in Administrative Review. At no time did the trial court consider whether the findings in the administrative proceedings were against the manifest weight of the evidence, nor whether there were procedural defects in the administrative proceedings, nor whether the other claims of the Plaintiff-Appellee had merit.

The Illinois Supreme Court went well beyond the scope of the record. This Court substituted its own judgment instead of permitting the trial court properly to make findings with regard to the content and manner of advertising based on the administrative proceedings. The Supreme Court has in effect usurped the role of conducting a de novo review without a proper remand to the trial court to consider fully Plaintiff-Appellee's claims. It is respectfully urged that this is an error on the part of this Court.

II. THIS COURT HAS CREATED A CONTRADICTION BY PERMITTING THE DEPARTMENT OF REGISTRATION AND EDUCATION TO CONTINUE TO ENFORCE AN UNCONSTITUTIONAL PROSCRIPTION ON ADVERTISING.

As noted in both the majority opinion and in Justice Clark's dissent, it must be conceded that the statute is grossly overbroad. That is to say, it is unconstitutional as a proscription on protected speech. However, the majority has deemed it necessary to reverse the trial court judgment and order the enforcement of the suspension of the Petitioner. It is assumed that this action is predicated on the assumption that the Petitioner does not have proper standing to raise the constitutional questions. However, as noted above, in so doing this Court has usurped the trial court responsibility. In addition, although the majority opinion denies that it has done so, it has perpetuated a full chilling of protected rights. That is to say, in reversing the trial court judgment, this Court has made a finding that the statute is constitutional, while commending the statute to the legislature for amendment. This is insufficient. It must be assumed that with the strength of the reversal of the judgment behind it, the Department of Registration and Education will resume investigation of and prosecution of those professionals who engage in advertising. Any advertising. Protected advertising. Even assuming that the principles of standing enunciated for commercial speech challenges are correct, it must be recognized that this Court's decision will perpetuate a chilling of any advertising by professionals until, or if, the legislature acts on this statute. This will amount to a prospective abridgement of rights that we know are and must be protected under the decision of the Supreme Court in Bates v. State Bar, ___ U.S. ___, 97 S.Ct. 2691 (1977). Must either the Plaintiff-Appellee or some other professional now subject himself to further risk of suspension to establish the proper parameters of advertising? This Court's decision gives

no guidance to the Department in determining whom it may prosecute and suspend in the interim period. We sincerely urge this Court to reconsider this problem created by its decision reversing the trial court while acknowledging that the statute is unconstitutional.

III. THE SCOPE OF PERMISSIBLE ADVERTISING FOR MEDICAL PROFESSIONALS MUST BE DEFINED IN TERMS OF REAL-WORLD CONSIDERATIONS.

There is an underlying factual reality which has been implicit in this appeal but not directly addressed heretofore. That reality is that chiropractic care is viewed with considerable disdain by the established traditional medical profession. The reality is that the Petitioner, or any other chiropractor, must overcome a cultured and encouraged bias against chiropractic care in attracting new patients to their concepts of health care. It was expected that the Illinois Supreme Court would grasp this problem intuitively. What this Court has inferentially referred to as "alluring" might be more accurately characterized as "persuasive." That is to say, there is a necessity to acquire or attract a reader's interest in order to maintain the reader's attention for a sufficient time to convey a certain message. That message is that it may be unnecessary to rely on "traditional" concepts of medical treatment and the usage of prescription drugs for remedying illness. We, therefore, suggest that it is imperative that the actual content and manner of the Petitioner's advertising be inquired into in this context. As noted above, we think that inquiry should be accomplished by the trial court. However, since this Court has deemed it necessary to attach as appendices certain of the advertisements involved, we feel we must address this issue directly. Note that our copy of this Court's appendices does not include all of the exhibits before the Department of Registration and Education. Why there was such selective inclusion, we do not

know. Looking at the Excerpts of Record where those exhibits are contained, several features stand out. The Department's Exhibit #7 (C-263) is arguably not advertising since it in no way can be construed to be solicitation of patients. That is because there is not a single reference to Dr. Talsky or any other individual practitioner anywhere on the face of that exhibit. It is intended to be an informative and demonstrative kind of educational material. It is in this context, for example, that the Plaintiff-Appellee's original claim of insufficient standards on the definition of "advertising" was based. Likewise, Department Exhibit #8 (C-264) has nothing to do with advertising. It is a notice of the offer to hire office staff. Department Exhibit #12 (C-277) is only a business card. And even if this were exhibited on a window, and were detachable, it is not inherently obvious why this is conduct or material which can be suppressed. Department Exhibit #1 (C-260) is, of course, one of the documents which specifies free refreshments and free spinal x-rays. It is, however, not an advertisement, per se, but an announcement of an open house. It is not immediately and facially apparent why an announcement of an open house, which might well be conduct engaged in by a hospital or clinic, must be found improper because it announces free refreshments, again, a common practice. This issue of permissible advertising is a sensitive one when applied to chiropractors. We suggest that the Plaintiff-Appellee can show to the trial court, if given the chance, that there are real differences in what is appropriate for a chiropractor and what is appropriate for other kinds of medical practitioners. The question cannot be resolved by so simple a device as lumping all together as professionals. Dr. Talsky's messages, claims and charges against the traditional medical profession cannot be judged by concepts which pre-date Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bates v. State Bar, ___ U.S. ___, 97 S.Ct. 2691 (1977).

Respectfully submitted,

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APPENDIX

APPENDIX

Docket No. 48997—Agenda 47—May 1977.

RICHARD J. TALSKY, Appellee, v. THE DEPARTMENT OF REGISTRATION AND EDUCATION *et al.*—(The Department of Registration and Education, Appellant.)

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

Plaintiff, Richard J. Talsky, filed an action in the circuit court of Cook County for administrative review of an order issued by the defendant Ronald E. Stackler, Director of the Department of Registration and Education, suspending plaintiff's license to practice as a chiropractor for 90 days on the grounds that he had engaged in advertising to solicit professional business in violation of subsections 4 and 13 of section 16 of the Medical Practice Act (Ill. Rev. Stat. 1971, ch. 91, pars. 16a(4), 16a(13)). The suspension was stayed by the circuit court pending administrative review. On review, the circuit court reversed the Department's decision on the basis that the restrictions on advertising contained in section 16(13) of the Medical Practice Act were overly broad and impermissibly restricted freedom of speech in contravention of the first amendment to the United States Constitution. The Department appeals directly to this court pursuant to our Rule 302(a). 58 Ill. 2d R. 302(a).

At the conclusion of an administrative hearing before the Medical Examining Committee of the Department of Registration and Education, the plaintiff was found to have violated section 16(4) of the Medical Practice Act for "[e]ngaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public" as well as section 16(13) of the Act, which prohibits advertising. It was the latter section which the circuit court held unconstitutional, and our review is accordingly limited to a consideration of that section, which provided for revocation or suspension of plaintiff's license on the following grounds:

"13. Except as otherwise provided in Section 16.01, advertising or soliciting, by himself or through another, by means of handbills, posters, circulars, steropticon slides, motion pictures, radio, newspapers or in any other manner for professional business." Ill. Rev. Stat. 1971, ch. 91, par. 16a(13).

The exceptions to the advertising ban are described as follows in section 16.01:

"Any person licensed under this Act may list his name, title, office hours, address, telephone number and any specialty in professional and telephone directories; may announce, by way of a professional card not larger than 3½ inches by 2 inches, only his name, title, degree, office location, office hours, phone number, residence address and phone number and any specialty; may list his name, title, address and telephone number and any specialty in public print limited to the number of lines necessary to state that information; may announce his change of place of business, absence from, or return to business in the same manner; or may issue appointment cards to his patients, when the information thereon is limited to the time and place of appointment and that information permitted on the professional card. Listings in public print, in professional and telephone directories, or announcements of change of place of business, absence from, or return to business, may not be made in bold faced type." Ill. Rev. Stat. 1971, ch. 91, par. 16a–1.

The facts are not in substantial dispute. On August 30, 1972, plaintiff caused to be published in the "Berwyn Life" newspaper the one-half page advertisement which is reproduced in appendix 1 to this opinion. Copies of the advertisement were also affixed to a substantial portion of the exterior window of the plaintiff's office in Cicero. As can be seen, the ads offered "FREE CHICKEN," "FREE REFRESHMENTS" and "FREE SPINAL X-RAY," and contained a section condemning reliance on drugs while extolling the virtues of the drugless chiropractic profession. On about August 13, 1974, plaintiff, individually or through another, attached advertising circulars similar to the ones reproduced in appendix 2 to certain traffic-light posts, a traffic-control box, and a United States mail box located at the intersection of 57th Avenue and Cermak Road in Cicero, together with other circulars which

identified the location of the Talsky chiropractic offices in the Chicago area. These circulars remained at that location until the end of September 1974. Plaintiff also attached circulars of the same type to the exterior of his office window in Cicero in addition to business cards which would be torn off and removed by passersby. The cards contained the words "Chiropractic TLC Office," plaintiff's name, address and telephone number with the words "Talsky Life Center" and "Tender Loving Care" appearing in small hearts.

It is apparent that we are here concerned with the extent to which the State may exercise its police power to restrict advertising by members of the health-related professions without impermissibly infringing upon those members' first amendment rights to freedom of speech. In order to place the questions involved in this appeal in their proper context, it is appropriate to trace the development of these concepts in the decisions of the United States Supreme Court and this court.

In *Semler v. Oregon State Board of Dental Examiners* (1935), 294 U.S. 608, 79 L. Ed. 1086, 55 S. Ct. 570, the court considered a statute which prohibited dentists from advertising their professional superiority and their prices; from using certain types of advertising displays; from employing solicitors or publicity agents; and from advertising free dental work, free examinations, guaranteed work or painless dental operations. The question before the court was whether the restrictions were arbitrary and invalid under the due process clause of the fourteenth amendment. In upholding the validity of the regulation, the court stated:

"The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency

> in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. ***
>
> *** The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement." (294 U.S. 608, 612-13, 79 L. Ed. 1086, 1090, 55 S. Ct. 570, 572.)

The rationale of the *Semler* decision was adopted by this court in a number of cases upholding the right of the State to regulate advertising by those engaged in medical and related professions. (*E.g., Winberry v. Hallihan* (1935), 361 Ill. 121; *People v. Dubin* (1937), 367 Ill. 229; *Lasdon v. Hallihan* (1941), 377 Ill. 187; *Klein v. Department of Registration and Education* (1952), 412 Ill. 75; *People ex rel. Chicago Dental Society v. A.A.A. Dental Laboratories, Inc.* (1956), 8 Ill. 2d 330; *Cordak v. Reuben H. Donnelley Corp.* (1960), 20 Ill. 2d 153.) In *Lasdon*, it was observed: "In the exercise of police power the practice of the professions has been subjected to licensing and regulation for the reason that the services customarily rendered by those engaged in such professions are so closely related to the public health, welfare and general good of the people, that regulation is deemed necessary to protect such interests. It has been held a proper exercise of police power to legislate and protect the professions performing such services against commercialization and exploitation." (377 Ill. 187, 193.) In upholding the statute which prohibited advertising by those engaged in the business of making dental plates, we further stated in that case: "It is well known that masses of the public do not comprehend or understand the skill that is necessary to the making of proper dentures and the proper charges to be made for such services. Such persons are often attracted by the advertisements of the quack and charletan and seek his services." 377 Ill. 187, 195.

The foregoing cases were decided primarily on due process grounds and were not concerned with first amendment questions. (But see *Cordak v. Reuben H. Donnelley Corp.* (1960), 20 Ill. 2d 153, 157.) This undoubtedly resulted from the fact that at the time those cases were decided the advertising of products and services was considered "purely commercial" speech which the United States Supreme Court had held was not entitled to first amendment protection. (*Valentine v. Chrestensen* (1942), 316 U.S. 52, 54, 86 L. Ed. 1262, 1265, 62 S. Ct. 920, 921.) The viability of the "commercial speech" exception to first amendment protection as enunciated in *Valentine* was seriously questioned by the court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* (1973), 413 U.S. 376, 37 L. Ed. 2d 669, 93 S. Ct. 2553, and was subsequently terminated in *Bigelow v. Virginia* (1975), 421 U.S. 809, 44 L. Ed. 2d 600, 95 S. Ct. 2222, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817, and *Bates v. State Bar* (1977), —— U.S. ——, —— L. Ed. 2d ——, 97 S. Ct. 2691. The latter two decisions, while not precisely on point, are highly significant in any consideration of the first amendment questions here.

In *Virginia Citizens*, the court struck down a Virginia statute which labelled it unprofessional conduct for a pharmacist to advertise prices of prescription drugs. No specific advertisement was at issue in the case, but the court hypothesized one reading as follows: "I will sell you the X prescription at the Y price." (425 U.S. 748, 762, 48 L. Ed. 2d 346, 358, 96 S. Ct. 1817, 1825.) The court first unequivocally held that such pure commercial speech does have some first amendment protections. The court also noted that the adverse effect of the suppression of prescription drug price information was greatest upon the poor, the sick, and the aged, who must spend a disproportionate amount of their income on prescription drugs. "When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain

or the enjoyment of basic necessities." (425 U.S. 748, 763-64, 48 L. Ed. 2d 346, 360, 96 S. Ct. 1817, 1826-27.) The court was of the opinion that information as to who is producing and selling what product, for what reason, and at what price plays an important role in the preservation of a predominantly free-enterprise economy in which the allocation of resources is in large measure made through numerous private economic decisions. "It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." (425 U.S. 748, 765, 48 L. Ed. 2d 346, 360, 96 S. Ct. 1817, 1827.) The court found the various justifications offered for the restrictions unconvincing, largely because high professional standards were already guaranteed to a substantial extent by the strict regulation to which pharmacists were subject in Virginia. The court further stated that "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information." (425 U.S. 748, 769, 48 L. Ed. 2d 346, 362-63, 96 S. Ct. 1817, 1829.) The court also suggested the following alternative to what it considered the "highly paternalistic approach" of the State: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." (425 U.S. 748, 770, 48 L. Ed. 2d 346, 363, 96 S. Ct. 1817, 1829.) *Virginia Citizens* clearly does not, however, mean that a State can never regulate commercial speech. The court said: "Some forms of commercial speech regulation are surely permissible. We mention a few [time, place, and manner restrictions; false, deceptive, or misleading speech; and speech which proposes an illegal transaction] only to make clear that they are not before us and therefore are not foreclosed by this case." 425 U.S. 748, 770, 48 L. Ed. 2d 346, 363, 96 S. Ct. 1817, 1830.

Virginia Citizens also left open the question whether advertisement of professional services was entitled to first amendment protection similar to that given to advertisement of retail prices of prepackaged prescription drugs. *Bates v. State Bar* (1977), ––– U.S. –––, –– L. Ed. 2d –––, 97 S. Ct. 2691, has quite recently answered this question affirmatively with respect to the advertisement of routine professional (legal) services. There, the court struck down a disciplinary rule of the Arizona Supreme Court prohibiting a lawyer from advertising. Two Arizona lawyers operating a legal clinic had advertised: "Do you need a lawyer? Legal services at very reasonable fees," and had specified fees for several routine uncontested matters.

In defining the issue before it, the court pointed out that no questions were raised relative to advertising the quality of legal services, nor was it concerned with problems associated with in-person solicitation of clients. Instead, the narrow question was whether lawyers could constitutionally advertise the prices at which certain "routine" services would be performed. Various arguments were proffered by the State bar in support of the restriction on price advertising, including an alleged adverse effect on professionalism, and contentions that professional advertising by lawyers inevitably would be misleading, that advertising would have an adverse effect on the administration of justice as well as on the quality of services provided by the legal profession, and that a wholesale restriction on advertising by lawyers is justified by the enforcement problems which would result if any other course was taken. While these arguments were not considered sufficient to justify a ban upon all advertising, the court apparently considered them sufficient to warrant the narrow restriction or regulation of advertising which the opinion indicated would be permissible. The court stated: "The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgable. A rule allowing restrained advertising would be in accord with the bar's obligation to 'facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.' American Bar Association, Code of Professional

Responsibility EC 2–1 (1976)." (––– U.S. ––––, ––––, –– L. Ed. 2d ––––, ––––, 97 S. Ct. 2691, 2705.) The court concluded that the publication in a newspaper of a truthful advertisement concerning the availability and prices of routine legal services was entitled to first amendment protection and that application of the disciplinary rule was violative of the first amendment. As it did in the *Virginia Citizens* case, however, the court emphasized that its holding did not mean that advertising by attorneys could not be regulated in any manner. The court again specifically stated that advertising which is false, deceptive or misleading is subject to restraint and pointed out that "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." (––– U.S. ––––, ––––, –– L. Ed. 2d ––––, ––––, 97 S. Ct. 2691, 2709.) The court also reiterated the view expressed earlier in the *Virginia Citizens* case that the State may impose reasonable restrictions on the time, place and manner of advertising and could suppress advertising concerning illegal transactions.

It is entirely clear that the advertisements before us violate section 16(13). However, under the authority of *Virginia Citizens* and *Bates*, we must conclude that the restrictions therein are overly broad and may operate in some cases to suppress commercial speech in violation of the first amendment. We commend to the General Assembly the reconsideration of these restrictions in the light of current constitutional interpretations.

Ordinarily a litigant is permitted to bring first amendment overbreadth attacks against a statute without demonstrating that his particular conduct is protected. (*Gooding v. Wilson* (1972), 405 U.S. 518, 521-22, 31 L. Ed. 2d 408, 413-14, 92 S. Ct. 1103, 1105-06.) The rationale is to fully protect permissible speech which might otherwise be inhibited by an overbroad statute. But the Supreme Court in *Bates* ruled that this rationale is inapplicable to commercial speech such as in this case. "[I]t seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. *** Since overbreadth has been described by this Court as 'strong

medicine,' which 'has been employed . . . sparingly and only as a last resort,' *Broadrick v. Oklahoma* [(1973), 413 U.S. 601, 613, 37 L. Ed. 2d 830, 841, 93 S. Ct. 2908, 2916], we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective." ––– U.S. ––––, ––––, –– L. Ed. 2d ––––, ––––, 97 S. Ct. 2691, 2707-08. Accordingly, we must specifically examine plaintiff's advertisements to determine whether they are entitled to first amendment protection under the criteria set forth in *Virginia Citizens* and *Bates*.

There can be no question about the fact that advertising by those engaged in the profession of treating bodily ills involves different considerations and risks than are involved in advertising by others. The availability of proper medical attention at the right time and from the right source obviously is of critical importance to every person. The natural and compelling urge to maintain good health and to find a cure for disease renders people particularly susceptible to advertising which suggests a means to accomplish these objectives. The potential to mislead is great, and it is apparent that the State has a very real and compelling interest in restricting the advertising of health-care services to those which are truthful, informative and helpful to the potential consumer in making an intelligent decision.

It is evident that Dr. Talsky's advertisements are significantly different from those in the *Virginia Citizens* and *Bates* cases, which were described by the Supreme Court as "restrained professional advertising." (See ––– U.S. ––––, ––––, –– L. Ed. 2d ––––, ––––, 97 S. Ct. 2691, 2703.) We note in particular the portion of the newspaper ad (appendix 1) entitled "Do You Feel Like This Fellow Looks?" which asks the questions "Wouldn't you like to feel better? Think about this: . . . If you feel as bad as you do now, how will you feel in 10, 20, 30 years from now? Can you afford to continue patching up symptoms when health is within reach through chiropractic. IT'S NOT TRUE TO SAY . . . 'We are doing everything possible' UNLESS CHIROPRACTIC IS INCLUDED." "*How about a CHIROPRACTIC spinal*

'BACK' TO SCHOOL CHECK-UP." The posted circulars and cards contained a before/after type set of pictures showing one healthy and one apparently sick, starving child and stating "SADNESS to SUNSHINE" and "SICKNESS to HEALTH"; the business cards play upon the letters TLC—"Talsky Life Center" and "Tender Loving Care"—both phrases being contained in little hearts. The advertisements assure the reader that "health is in reach through chiropractic" and "elimination of the NEED for drugs *** is not a far fetched idea, but an accomplished fact!! The answer to most health problems is found in chiropractic—the world's largest and finest drugless healing profession. That's right: drugless. Chiropractic eliminates the need for drugs which treat symptoms by eliminating the true cause of most chronic health problems—displacement of spinal vertebrae." The advertisements offer free chicken and refreshments, identify with a well-known celebrity (the newspaper advertisement quotes Art Linkletter on drug abuse), and picture a man on his knees praying and asking, "Why didn't someone tell me about chiropractic care sooner" while relaying the message, "Others get well, so can you."

We include the foregoing lengthy recitation of plaintiff's advertisements and techniques to emphasize the differences between this case and the *Virginia Citizens/Bates* tandem. Plaintiff does not advertise "X product or X service at Y price." Plaintiff's advertisements do not concern a uniform product or a routine standardized service, nor do they convey information which is susceptible of precise measurement or empirical testing in order to determine whether it is false, deceptive or misleading.

In *Bates*, citing *Virginia Citizens*, the court emphasized the importance of not restricting the dissemination of information which assures "informed and reliable decisionmaking" by the public. (—— U.S. ——, ——, — L. Ed. 2d ——, ——, 97 S. Ct. 2691, 2699.) The thinly veiled, alluring promises of physical relief contained in Dr. Talsky's advertisements clearly do not serve that function. Little, if any, information is given which would be helpful to intelligent decision making, and it cannot, in

our judgment, fairly be said that prohibiting advertising of the type before us denies useful information to any segment of society as in *Virginia Citizens* or inhibits access to needed professional services as in *Bates*. This case simply does not involve "restrained professional advertising."

The potential for abuse in advertising by professionals, especially in the health-care field where persons are peculiarly susceptible to alluring promises of relief, has long been recognized. (See, *e.g.*, *Semler v. Oregon State Board of Dental Examiners* (1935), 294 U.S. 608, 612, 79 L. Ed. 1086, 1090, 55 S. Ct. 570, 572; *Klein v. Department of Registration & Education* (1952), 412 Ill. 75, 83; *Lasdon v. Hallihan* (1941), 377 Ill. 187, 195.) The recent Supreme Court decisions do not require that our concern for such problems be discarded. On the contrary, *Bates* recognized the need for close regulation and tight restrictions on misleading and untruthful professional advertising, and its rationale is applicable here: "Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. [Citations.] In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation. We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." —— U.S. ——, ——, — L. Ed. 2d ——, ——, 97 S. Ct. 2691, 2709.

We emphasize that this opinion should not be construed as indicating our blanket approval of the statutory restrictions as applied to "restrained professional adver-

tising" by those professionals subject to the Medical Practice Act.

Since, in our view, plaintiff's advertisements were uninformative and misleading, they were not entitled to first amendment protection within the purview of the *Virginia Citizens* and *Bates* decisions. We believe it is further evident that the attachment of even protected advertising material to traffic-light posts, traffic-control boxes and United States mail boxes would constitute an improper time, place and manner for the advertising of professional services under those cases. We therefore conclude that the trial court erred in holding section 16(13) of the Medical Practice Act unconstitutional and violative of plaintiff's first amendment right of freedom of speech with regard to the advertising here in question.

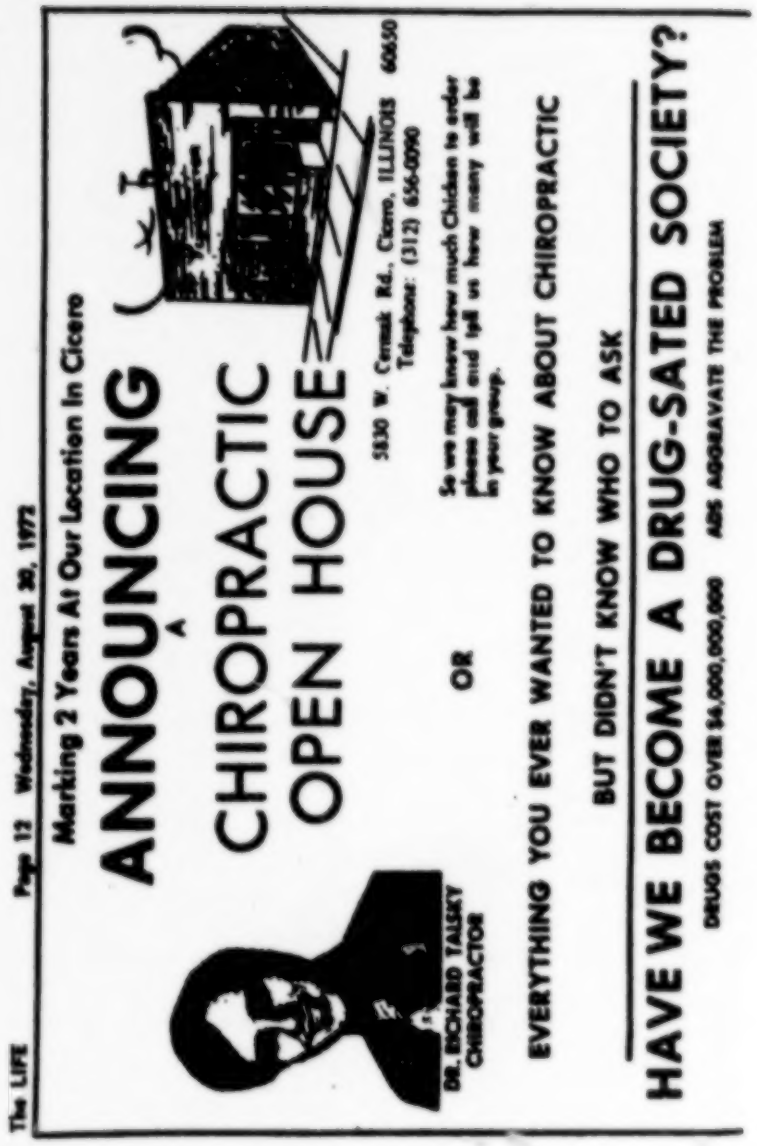
Plaintiff also argues that the statute must be held invalid since the terms "advertising" and "solicitation" are unconstitutionally vague and because review of the Department's decision under the Administrative Review Act does not provide a sufficiently prompt resolution of the matter. We find no merit to these contentions. Likewise, we do not agree with plaintiff's argument that he has been denied equal protection of the law by a statute which singles out medical practitioners for restrictions on advertising. The justification and necessity for regulation of those engaged in professions which are closely related to public health, welfare and the general good of the public are too well established to require discussion. *E.g., United States v. Oregon State Medical Society* (1952), 343 U.S. 326, 96 L. Ed. 978, 72 S. Ct. 690; *Semler v. Oregon State Board of Dental Examiners* (1935), 294 U.S. 608, 79 L. Ed. 1086, 55 S. Ct. 570; *Lasdon v. Hallihan* (1941), 377 Ill. 187.

The judgment of the circuit court of Cook County is reversed, and the order of the Department of Registration and Education suspending plaintiff's license for 90 days is affirmed.

Judgment reversed; order affirmed.

MR. JUSTICE DOOLEY, dissenting.

APPENDIX 1



Our society has become drug-sated. Never before have so many people taken so many different pills and potions for so many different reasons: pills for sleeping and pills for staying awake; pills to excite you and pills to calm you down; pills to lose weight and others to gain weight; pills for everything from birth to death.

One of the best-known crusaders against our modern drug craze is Art Linkletter, whose daughter was killed by an overdose of drugs. On a national TV program Art Linkletter said, "This was a natural course for my daughter and many other young people who sought a thrill from the use of drugs because our entire society has become drug-orientated. "Drug abuse cannot be connected with narcotics users only," according to Art Linkletter, "The alarming rise in the abuse of stimulant, depressant and hallucinogenic drugs cuts across all strata of society."

OUR CULTURE IS DRUG-DEPENDENT

Our entire culture is truly becoming drug-dependent. Over 100,000,000 Americans—more than half the population use drugs ranging from tranquilizers to barbiturates and amphetamines, not counting marijuana or LSD. This grave national problem is far broader and deeper than merely "alarming fads among the youth."

Millions of ordinary, middle-aged, middle-income Americans gulp billions of tranquilizers—in fact, last year 5,000,000,000 tranquilizers were downed by over 50 million people, but as a whole they are not more tranquil.

DRUGS COST OVER $6,000,000,000

Our national drug bill is now over six billion dollars—more than $30 for each man, woman and child in the country! As a nation we are becoming dependent upon "innocent-sounding" pills. Countless millions have created a "drug-curtain" between themselves and reality, little realizing that they are in fact becoming HOOKED on drugs!

"Relief is just an instant away," is the message Madison Avenue bombards us with night and day. Advertising strategy is as varied as the pills of every size, color, coating and speed of action.

The "youth problem" is only a small part of the national problem. Overweight housewives have become addicted to amphetamic "reducing pills." Some businessmen, who have tried pills to cure their hangovers, have become "hooked." Some "senior

citizens" take pills because of their fear of old-age. Many become "hooked" and don't even realize it!

ADS AGGRAVATE THE PROBLEM

What is the cause of our national drug problem? Certainly psychologically planned advertising, taking advantage of television and other mass media of modern mass media of communication; contributes greatly to the problem as it plays on the pressures and problems of modern life. In Martin Gross' powerful, documented book The Doctors he explains, "America is currently involved in a massive, promiscuous addiction to the concept of medication. Having overdosed itself on the miracles of pharmacology, it is hypnotically ingesting as much chemical as 'Gracious' physicians will prescribe."

The abuse of drugs by youth today is, frankly stated, the example set by parents! The first drugs most young people get are from the family medicine cabinet. "For kicks" they take their parents tranquilizers, diet or weight pills or drink cough syrup for the codine. Thus, the sins of the parents will recap a bitter harvest in the future.

WHAT IS THE SOLUTION?

What is the solution to this terrible problem? First, the nation must be aroused and fully awakened to the magnitude and scope of this problem and realize that it goes into every medicine cabinet in America. No problem can be solved until everyone involved realizes the problem!

The ideal solution—simple to state but nearly impossible to implement—would be to abolish the use of all drugs except under very tightly-regulated conditions! A step in this direction would be the banning of advertising—first on television and then in other media—of all drug advertising.

To implement even this first step requires an informed and aroused citizenry. We're helping to alert the public through articles such as this one, and you can help us by showing this to your friends and relatives.

ELIMINATE NEED FOR DRUGS

Even more important than elimination drug advertising is the elimination of the NEED for drugs! This is not a far fatched idea, but an accomplished fact!! The answer to most health problems is found in chiropractic—the world's largest and finest drugless healing profession. That's right: drugless. Chiropractic eliminates the need for drugs which treat symptoms by eliminating the true cause of most chronic health problems—displacement of spinal vertebrae.

The nerve energy which powers every organ of the body and is necessary for cell life flows through the spinal cord and the nerves. When a vertebrae moves out of its normal range of motion and becomes fixed by changes in the ligaments and muscles, the nerve power for various organs is cut off and sickness results. If you are not personally acquainted with chiropractic, read carefully all the true testimonials and COME TO OUR OPEN HOUSE AND FIND OUT WHAT CHIROPRACTIC HAS TO OFFER FOR YOU AND YOUR ENTIRE FAMILY.

How about a CHIROPRACTIC spinal "BACK" TO SCHOOL CHECK-UP

PREVENTICARE

FAMILY CHIROPRACTIC MAINTENANCE CARE

ALL THAT'S MISSING IS YOU

ADJUSTING ROOM WITH PATIENT HAVING SPINE CHECKED. (4 YEAR OLD TRACY)

EXAMINATION ROOM WITH PATIENT GETTING SPINAL X-RAY EXAM

APPENDIX 1—Continued

ENTIRE FAMILIES WAITING TO HAVE THEIR SPINES CHECKED.

SUNDAY SEPT. 3RD 3 P.M. EVERYONE WELCOME

WE LOVE CHIROPRACTIC

FACIAL NEURALGIA

I visited doctor after doctor trying to get relief for a severe pain in the left side of my face called tri-geminal neuralgia. I was given injections of drugs including pain-killers and told if it didn't help I would have to submit to surgery to have the nerve severed.

This would leave me without any feeling in one half of my face; I would also drool and would have to be very careful not to bite into my tongue while eating.

I was referred to Dr. Talsky by a friend who was helped for a serious condition. After my second adjustment I was able to bite into an apple. The pain has disappeared with all my frustration and depression. I have nothing but praise for this profession after living the life of a "Guinea pig" and intend to continue with my adjustments.

Mrs. Anne Donet (Sunshine)
7117 W. Pershing Rd.
Berwyn, Illinois
788-9121

BLADDER INFECTION

I bring my 9 year old daughter, Lisa, who had bladder infections quite often and her tonsils were very bad. The m.d. was giving her two bottles of penicillin to stop the infection. Since chiropractic care she's had only one short bladder infection (clearing in a fraction of the time) and no more problem with tonsils. She enjoys her regular visits.

LISA
Mrs. Dave Elliot
& Lisa
1456 S. 50th Ct.

OUR MOTTO:
Better Health at Lower Costs

LIFE FOUNDATION MEMBER

FREE CHICKEN
FREE REFRESHMENTS
FREE SPINAL X-RAY
IN COOPERATION WITH THE LIFE FOUNDATION OF ATLANTA, GA.

APPENDIX 2

FAMILY CHIROPRACTIC LIFE CENTER

CHIROPRACTIC TLC OFFICES OF GREATER CHICAGO

CICERO

CHICAGO

DR. A. TALSKY, CHIROPRACTOR

ATTENTION NEIGHBORS

The TALSKY CHIROPRACTIC LIFE CENTER on Clark St., is seeking an active individual who would like to work, part time. An ideal situation for an individual who is available Monday through Sat., during the day. Attractive and interesting working conditions.

If interested please apply or call 871-1700

CLARK, Justice, dissenting:

I would uphold the judgment of the circuit court.

To determine the constituionality of a given restriction of first amendment rights, the court must weigh the State's interest in the restriction against the policies underlying the first amendment generally, and against the rights of the speaker and his audience particularly. (See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Control Council (1976), 425 U.S. 748, 756-70, 96 S.Ct. 1817, 1822-30, 48 L.Ed.2d 346, 355-63). Here the State's purported interest is in protecting its citizens from being misled by advertisements falsely claiming exorbitant benefits from chiropractic services. I believe the majority seriously underestimates the intelligence, common sense, and good judgment of the people of this State. Consequently, the majority has vastly overestimated the State's interest in restricting the defendant's right to speak and the people's right to hear him.

The majority concedes that the statute is grossly overbroad, yet it still finds defendant's conduct punishable. (See 68 Ill. 2d at 590-92, 12 Ill. Dec. at 555, 556, 370 N.E. 2d at 178, 179). The majority does not, however, adequately delineate what it finds objectionable in the defendant's advertisements. Is it the free chicken? The suggestion that drugs are not the answer to all problems? The statements of satisfied former patients?

The department does not contend that defendant promised anything that he could not deliver, nor does it contend that defendant was proposing to do anything unlawful or otherwise harmful. In the absence of such a showing, I would let the people of this State make up their own minds about the value of chiropractic services, rather than have the Department do it for them. I therefore respectfully dissent.

DOOLEY, Justice, also dissenting:

The majority commingles and confuses section 16(4) of the Medical Practice Act relating to ethical conduct and section 16(13) prohibiting advertising by all licensees (Ill. Rev. Stat. 1971, ch. 91, pars. 16a(4), 16a(13).

Section 16(13) prohibits, "[e]xcept as otherwise provided in Section 16.01, advertising or soliciting, by himself or through another, by means of handbills, posters, circulars, stereopticon slides, motion pictures, radio, newspapers or in any other manner for professional business." Ill. Rev. Stat. 1971, ch. 91, par. 16a(13).

The statute exempts from the ban, by reference to another section of the Act, listing in telephone or professional directories and the issuance of professional cards of prescribed dimensions with contents limited to name, title, address, phone, degrees and specialty. Ill. Rev. Stat. 1971, ch. 91, par. 16a-1.

The root cause of this controversy is the constitutionality of the prohibition against all advertising. In holding this statute constitutional

the majority opinion does directly counter to the recent decisions of the United States Supreme Court defining first amendment rights. In so doing, it is out of touch with today's trend of the law.

I take no issue with the majority review of early cases determining that the due process clause was not infringed by imposing regulations on those engaged in the medical profession. (Semler v. Oregon State Board of Dental Examiners (1935), 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086). My concern - and it is a grave one - is with our duty under the fourteenth amendment to protect first amendment rights as interpreted by the United States Supreme Court (Bigelow v. Virginia (1975), 421 U.S. 809, 811, 95 S.Ct. 2222, 2227, 44 L.Ed. 2d 600, 606), and to determine whether section 16(13) of the Medical Practice Act infringed such rights.

Some 25 years ago the United States Supreme Court in Valentine v. Chrestensen (1942), 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262, 1265, in considering a municipal sanitary ordinance prohibiting the distribution of advertising handbills on streets, limited first amendment protection of "commercial speech." But what constituted "commercial speech" was not defined. In the quarter century since Chrestensen the United States Supreme Court has retreated from that position and finally rejected any such all-pervasive lack of protection. Bigelow v. Virginia (1975), 421 U.S. 809, 818, 95 S.Ct. 2222, 2230-31, 44 L.Ed. 2d 600, 609.

Although courts have consistently held that a prohibition of deceptive advertising does not offend the first amendment (Donaldson v. Read Magazine,

Inc. (1948), 333 U.S. 178, 189, 68 S.Ct. 591, 597, 92 L.Ed. 628, 640), it is well established that advertising is a medium of information and persuasion providing much of the day-to-day education of the American public and facilitating allocation of resources necessary to a free-enterprise economy. (Bates v. State Bar (1977), ___ U.S. ___, ___, 97 S.Ct. 2691, 2699, 53 L.Ed. 2d 810, 823; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (1976), 425 U.S. 748, 765, 96 S.Ct. 1817, 1827, 48 L.Ed. 2d 346, 360; Bigelow v. Virginia (1975), 421 U.S. 809, 821, 95 S.Ct. 2222, 2232, 44 L.Ed. 2d 600, 612; Developments in the Law - Deceptive Advertising, 80 Harv. L.Rev. 1005, 1027 (1967). It is, therefore, entitled to first amendment protection. See also Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations (1973), 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed. 2d 669; New York Times Co. v. Sullivan (1964), 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed. 2d 686, 701; NAACP v. Button (1963), 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405; Note, Commercial Speech - An End in Sight to Chrestensen?, 23 DePaul L.Rev. 1258, 1269 (1974); Note, Advertising, Solicitation and the Professions's Duty to Make Legal Counsel Available, 81 Yale L.J. 1181, 1186 (1972).

In Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations (1973), 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed. 2d 669, in which discriminatory advertisement was not entitled to first amendment protection, the court indicated that in some situations commercial advertising may serve first amendment interests and prevail when balanced against governmental interest in regulation. In the ensuing years in Virginia State Board of

Pharmacy v. Virginia Citizens Consumer Council, Inc. (1976), 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346, and in Bates v . State Bar (1977), ___ U.S. ___, 97 S.Ct. 2691, 53 L.Ed. 2d 810, the United States Supreme Court unequivocally held that advertising was entitled to first amendment protection. Here, the majority undercuts the thrust of Virginia Pharmacy and Bates.

In Virginia Pharmacy the United States Supreme Court invoked the balancing approach. While acknowledging that the State had a strong interest in maintaining professionalism among pharmacists (just as the State has an interest in maintaining professionalism among chiropractors), the court held that a statute banning all advertising of price lists violated first amendment rights. It stated:

> "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." (425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed. 2d 346, 363).

Although the court indicated that regulation of certain kinds of speech would be permissible, i.e., time, place and manner restrictions, and false, deceptive or misleading speech, it recognized that such a permissible regulation was not before it. First amendment rights were violated.

It is that determinative factor in Virginia Pharmacy which the majority here overlooks. Although some type of commercial-speech regulation could be deemed constitutional, such a permissible regulation was not before it. As a result, the

Supreme Court held the regulation unconstitutional in violation of first amendment rights. Here, too, we have no such permissible regulation or statute which could, under Virginia Pharmacy, be constitutional.

On the contrary, section 16(13) of the Medical Practice Act does not merely restrict false, deceptive or misleading speech, or limit the time, place and manner of advertising. It prohibits all advertising and soliciting in all known modes or "in any other manner." (Ill. Rev. Stat. 1971, ch. 91, par. 16a(13). Under the Virginia Pharmacy case this court is obliged to consider the statute before it, not what it might be, in determining whether first amendment rights are involved. What might have been can never be known - even to a court.

Most recently, in Bates v. State Bar (1977), ___ U.S. ___, 97 S.Ct. 2691, 53 L.Ed. 2d 810, the Supreme Court condemned as violative of first amendment rights a comprehensive ban on all advertising by members of the legal profession. The court stated: "In sum, we are not persuaded that any of the proffered justifications rises to the level of an acceptable reason for the suppression of all advertising by attorneys." (Emphasis added). (___ U.S. ___, ___, 97 S.Ct. 2691, 2707, 53 L.Ed. 2d 810, 833). While advertising by attorneys may not be subjected to blanket suppression, it was recognized that "there may be reasonable restrictions on the time, place and manner of advertising" (___ U.S. ___, ___, 97 S.Ct. 2691, 2709, 53 L.Ed. 2d 810, 836). In Bates the statute before the Supreme Court had no such "reasonable restrictions" on advertising and therefore infringed first amendment rights. The same may be said of the statute

before us today.

I cannot perceive how the majority opinion can so strain the language in Virginia Pharmacy and Bates to sustain its position that section 16(13), a blanket suppression of advertising, is constitutional. The majority, we assume, is aware that we are not considering permissible "reasonable restrictions" on advertising. The particular statute imposes a comprehensive ban on all advertising.

The majority concedes that, under Bates, section 16(13) may be "overly broad." It admits that "[it] may operate in some cases to suppress commercial speech in violation of the first amendment," and even goes further to suggest that the General Assembly reconsider the statute "in light of current constitutional interpretations." But then it draws away from the vortex. In the exercise of a splendid optimism, it construes section 16(13) as though it were rewritten by the court and permitted "restrained professional advertising," and barred only false, deceptive or misleading advertising, and, therefore, finds it constitutional. Does the majority actually hold that section 16(13), barring all advertising by those subject to the Medical Practice Act, does not mean what it says? Just what are the terms of this apparently "rewritten" statute? How can such terms be applied by any court?

We are obliged to adjudicate the constitutionality of section 16(13) as it is written, not as it might be rewritten by this court to conform to language in the United States Supreme Court cases. In my opinion it is an improper exercise of a judicial function to rewrite this statute banning all advertising to mean that it prohibits only misleading

advertising. In so doing, we abdicate a fundamental function of the third branch of government, to determine the constitutional character of the legislative product. More than that, we usurp the legislative function in, in effect, rewriting a statute.

The judgment of the circuit court voiding section 16(13) of the Medical Practice Act as unconstitutional ought to be affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1513

RICHARD J. TALSKY,

Petitioner,

vs.

DEPARTMENT OF REGISTRATION AND EDUCATION, STATE OF ILLINOIS,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RICHARD J. TALSKY, *Pro Se*
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

RICHARD J. TALSKY,

Petitioner,

vs.

DEPARTMENT OF REGISTRATION AND EDUCATION, STATE OF ILLINOIS,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

CCG-2 ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

Talsky	)	
	)	
v.	)	NO. 76 L1979
	)	
Department of Registration and Education et al	)	

ORDER

This cause coming on to be heard by plaintiff the defendant being represented before the court and the court being fully advised in the premises

IT IS ORDERED that

The decision of the Department of Registration and Education is reversed in that the laws in question are contrary to the law and unconstitutional as violative of the First Amendment.

JUDGE ARTHUR L. DUNNE

/s/ JUN 29 1976

CIRCUIT COURT

Name Edward T. Stein
Attorney for plaintiff
Address 53 W. Jackson
City Chicago
Telephone 431-0082

ENTER:

.....
Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1513

RICHARD J. TALSKY,

Petitioner,

v.

DEPARTMENT OF REGISTRATION AND EDUCATION, STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE STATE RESPONDENT

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BRIEF FOR THE STATE RESPONDENT

BRIEF IN OPPOSITION

RESPONDENT, DEPARTMENT OF REGISTRATION AND EDUCATION of the State of Illinois, respectfully prays that the petition for writ of certiorari filed by RICHARD J. TALSKY be denied.

OPINIONS BELOW

The decision of the Illinois Supreme Court is reported at 68 Ill. 2d 579, 370 N.E. 2d 173 (1977).

JURISDICTION

(omitted)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(See Supplement)

U.S. CONST., amend. I;
Ill. Rev. Stat., 1975, Ch. 91, § 16a.

QUESTIONS PRESENTED

1. Does the petitioner, Richard J. Talsky, have standing to challenge the constitutionality of the advertising restriction contained in Section 16a(13) of the Illinois Medical Practice Act?

2. Did the Illinois Supreme Court correctly interpret and apply the prior decision of this Court in *Bates* v. *State Bar of Arizona*?

STATEMENT OF THE CASE

Richard J. Talsky, a chiropractor licensed to practice in the State of Illinois, appeared before the Illinois Medical Examining Committee to answer charges that he engaged in advertising to solicit professional business in violation of Ill. Rev. Stat., 1975, Ch. 91, §§ 16a(4) and (13). The Illinois Medical Examining Committee found from the testimony and evidence presented that Dr. Talsky had used handbills, circulars, and newspaper advertisements to solicit professional business and, for the same purpose, had distributed business cards by affixing the same to the exterior of his office window so they could be removed by passers-by. The findings led the Committee to conclude that Dr. Talsky violated Ill. Rev. Stat., 1975, Ch. 91, §§ 16a(4) and (13) and resulted in a recommendation that the Director of the Department of Registration and Education suspend Dr. Talsky's license for ninety (90) days. After reviewing a Motion for Rehearing, the Director adopted the Findings of Fact, Conclusions of Law, and Recommendations to the Director of the Medical Examining Committee and ordered the license of Dr. Talsky suspended for ninety (90) days.

Dr. Talsky then filed a complaint for administrative review pursuant to the Illinois Administrative Review Act (Ill. Rev. Stat., 1975, Ch. 110, §§ 264, *et seq.*) and the Department of Registration and Education answered by filing the entire administrative record. The trial court stayed the suspension pending disposition on the merits.

The hearing before the trial court proceeded on Dr. Talsky's complaint for administrative review. By statute, the purpose of the judicial review was to determine whether the Department's decision was supported by the evidence

in the record and was in accordance with the law. The court's review was restricted to the evidence in the record. Ill. Rev. Stat., 1975, Ch. 110, § 274. The only evidence in the record was offered by the Department and comprised the various advertisements placed by Dr. Talsky.

Upon review of the record and consideration of the arguments, the trial court ruled that the advertising restrictions in the Illinois Medical Practice Act (Ill. Rev. Stat., 1975, Ch. 91, § 16a(13)) were unconstitutionally overbroad, vague, and indefinite. Upon motion of the Department of Registration and Education to reconsider and vacate, the trial court withdrew its finding that the advertising restrictions were unconstitutionally vague and indefinite, but declined to alter its conclusion that the scope of the restriction was unconstitutional.

Pursuant to Illinois Supreme Court Rule 302(a), the Department appealed directly to the Illinois Supreme Court. In a five to two decision, the Illinois Supreme Court reversed the trial court. The majority recognized that "under the authority of *Virginia Citizens* and *Bates,* we must conclude that the restrictions [in section 16(13)] are overly broad and may operate in some cases to suppress commercial speech in violation of the First Amendment," 68 Ill. 2d at 590, 370 N.E. 2d at 178; however, the majority reversed the trial court based on its conclusion that Dr. Talsky's advertisements were not entitled to First Amendment protection.

Dr. Talsky petitioned the Illinois Supreme Court for a rehearing. The petition was denied without opinion.

REASONS FOR DENYING WRIT

I.

THERE IS NO CONFLICT OF DECISION NOR ANY IMPORTANT QUESTION OF FEDERAL LAW.

There is no conflict between the decision of the Illinois Supreme Court and the prior decisions of this Court. In its decision, the Illinois court carefully considered the decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and applied the dictates of that decision to the case before it. The Court recognized that after *Bates,* the broad advertising restrictions in the Illinois Medical Practice Act were probably unconstitutional and recommended that the Illinois legislature reconsider the restrictions in light of current constitutional mandates. However, the Court declined to rule the restrictions unconstitutional because it found that the advertisements before it were not entitled to First Amendment protection within the purview of this Court's decisions in *Bates* and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

Thus the Illinois decision is restricted to the nature of the particular advertisements before the Court and has no practical effect on other professionals who advertise in Illinois. It is safe to assume that the Illinois legislature will act on the recommendation of the Illinois Supreme Court to conform Illinois law with the dictates of this Court. The parameters of professional advertising in Illinois will be determined when the state legislature enacts legislation in light of the First Amendment status accorded commerical

speech. At that time Illinois courts, and ultimately this Court, will decide whether the scope of restrictions established by the legislature are constitutional.

The Illinois court gave no indication of what legislative restrictions on professional advertising would be permissible and, as a consequence, review of the Illinois decision will not serve to delineate the permissible scope of regulation. The decision therefore has no national or statewide significance nor does it affect litigants other than Dr. Talsky. The decision has no practical consequences beyond the determination that Dr. Talsky's advertisements were not entitled to First Amendment protection.

II.

THE DECISION BELOW IS CORRECT.

> This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Bigelow* v. *Virginia,* 421 U.S. 809, 816 (1975).

The above represents a statement of the expanded standing provided litigants who allege a statute is overbroad in violation of the First Amendment. It also represents a departure from the traditional standing requirement that the activity at bar be constitutionally protected before a litigant can challenge the constitutionality of a statute on the ground that it is overbroad. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 611 (1973); *Dombrowski* v. *Phister,* 380 U.S. 479, 486 (1965).

In *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 381 (1977), this Court held that:

> Since overbreadth has been described by this Court as 'strong medicine,' which 'has been employed . . . sparingly and only as a last resort,' *Broadrick* v. *Oklahoma,* 413 U.S., at 613, 93 S. Ct., at 2916, we decline to apply it to professional advertising a context where it is not necessary to further its intended objective. Cf. *Bigelow* v. *Virginia,* 421 U.S., at 817, 818, 95 S. Ct., at 2230.

The decision below is based on traditional standing requirements. To determine whether Dr. Talsky has standing, two questions must be considered. The first question is whether Dr. Talsky's advertisements are commercial speech. If they are, then pursuant to the holding in *Bates,* Dr. Talsky can challenge the statute only if his advertisements are protected speech. Assuming Dr. Talsky's advertisements to be commercial speech, the second question is whether they are entitled to the qualified First Amendment protection afforded such speech. If Dr. Talsky's advertisements are commercial speech and not within the scope of the qualified First Amendment protection set forth in *Bates,* then the decision below is correct.

To ascertain whether or not Dr Talsky's advertisements are commercial speech requires a historical review of the commercial speech doctrine. Prior to 1975, the decision whether a particular expression was entitled to First Amendment protection depended on whether or not it was considered "commercial." *Valentine* v. *Chrestensen,* 316 U.S. 52, 54 (1942). The classification of speech as "commercial" stripped it of its First Amendment protection and resulted in a strong likelihood that the speech would be subject to regulation under the state's police power. *Head* v. *New Mexico Board,* 374 U.S. 424 (1963); *Williamson* v.

Lee Optical, 348 U.S. 483 (1955); *Breard* v. *Alexandria,* 341 U.S. 622 (1951); *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935).

Because the classification "commercial" subjected broad categories of speech to prior restraints, the definition of commercial speech narrowed in almost every decision following *Chrestensen. Murdock* v. *Pennsylvania,* 319 U.S. 105 (1942); *Thomas* v. *Collins,* 323 U.S. 516 (1944); *New York Times* v. *Sullivan,* 376 U.S. 254 (1963); *Pittsburgh Press* v. *Pittsburgh Comm. on Human Relations,* 413 U.S. 376 (1973); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). By the time the decision in *Bigelow* was rendered, serious doubt existed as to whether any speech could henceforth be categorized commercial. *Virginia Citizens,* 425 U.S. at 760.

The continuous limitations on the definition of commercial speech ended with the decision in *Virginia Citizens.* In that decision this Court formally overturned the commercial speech doctrine. The rationale for the abandonment of the doctrine was set forth most succinctly in Justice Stewart's concurring opinion:

> Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decision-making. 425 U.S. at 780-781 (Stewart, J., concurring).

It was therefore a combination of the informational value of commercial speech and the existence of a method whereby the States could adequately protect the public welfare,

without totally suppressing commercial speech, that destroyed the commercial speech doctrine. To preserve the benefits of commercial speech while maintaining the states' power to insure that such speech retained its beneficial aspects, the decisions in *Virginia Citizens* and *Bates* balanced the informational value of commercial speech against the public interest in totally prohibiting such speech. The result was the extension of qualified First Amendment protection to commercial speech. In note 24 to the *Virginia Citizens* decision, Justice Blackmun stated:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly different from other forms. There are commonsense differences between speech that does no more than propose a commercial transaction, *Pittsburgh Press Co.* v. *Pittsburgh Comm's on Human Relations,* 413 U.S. at 385, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. 425 U.S., at 771-772, n. 24.

This Court recognized that to extend the full panoply of First Amendment protection to professional advertising would make the regulation of such advertising ineffective. In his concurring opinion in *Virginia Citizens,* Chief Justice Burger noted:

> I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are 'misleading' and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading since what the professional must do will vary greatly in individual cases. 425 U.S. at 775 (Burger, C. J., concurring).

The extension of qualified First Amendment protection to professional advertising thus strikes a delicate balance between the free flow of commercial information and the public interest in the maintenance of safeguards against deception and advertising abuses. However, that balance will not maintain its symmetry if the restrictive definition of commercial speech developed prior to *Virginia Citizens* continues to be applied. If this Court continues to use the concept of commercial speech that unfolded in *Bigelow*, commercial speech will flow freely, but not very cleanly.

The restrictive view of commercial speech was utilized to avoid the commercial speech doctrine and its drastic effect upon free expression. With the demise of the doctrine in *Virginia Citizens* there is no longer any reason to retain an overly restrictive concept of commercial speech. We therefore respectfully submit that the definition of commercial speech should be laid to rest with the doctrine that generated it.

The qualified First Amendment protection developed in *Virginia Citizens* and *Bates* should be the limit of the protection afforded professional advertising. Professional advertising can be defined as expression principally intended to propose or promote a commercial transaction. It can also be defined as a "commercial proposition directed toward the exchange of services rather than the exchange of ideas." See *Bigelow* v. *Virginia*, 421 U.S. 809, 831 (1975) (Rehnquist, J., dissenting). In the Illinois statute, advertising is included only if it is advertising "to solicit professional business." Ill. Rev. Stat., 1975, Ch. 91, § 16a(13).

In the instant case, Dr. Talsky's advertisements clearly propose or promote a commercial transaction and are principally directed toward the exchange of services rather than the exchange of ideas. The Illinois courts specifically

determined that his advertisements were designed to solicit professional business. They should therefore be entitled only to the qualified First Amendment protection outlined in *Virginia Citizens* and *Bates*. Extension of the full panoply of First Amendment safeguards to Dr. Talsky's advertisements would immunize them from the regulatory power of the state even though they are false, deceptive and misleading. *New York Times* v. *Sullivan*, 376 U.S. 254, 266 (1963). Such a result would negate the very beneficial aspects of professional advertising which initially led this court to extend it qualified First Amendment protection. Therefore, Dr. Talsky's advertisements are not entitled to unqualified First Amendment protection and he consequently has standing to challenge the Illinois statute only if his advertisements are not subject to the permissible limitations that may be imposed on advertising by physicians and chiropractors.

The precise outline of what limitations can constitutionally be imposed on professional advertising has not yet been drawn. However, in both *Bates* and *Virginia Citizens* this Court gave three examples of permissible restrictions that may be imposed on professional advertising. They are:

> (a) prohibitions on false, deceptive or misleading speech; (b) time, place and manner restrictions; and (c) prohibitions on advertising which promotes conduct which is illegal. 433 U.S. at 383-384; 425 U.S. at 771-772.

In both *Bates* and *Virginia Citizens*, the very first example of permissible limitations on advertising is the restraint of advertising that is false, deceptive or misleading. The decision of the Illinois Court can rest solely upon the conclusion that Dr. Talsky's advertisements are false, deceptive, and misleading.

There are two patently false and misleading themes running through Dr. Talsky's advertisements. The first theme is that all drug use is harmful and that most illnesses can be cured without drugs through chiropractics. Dr. Talsky advertises that: "health is in reach through chiropractics" and "elimination of the NEED for drugs is not a far fetched idea but an accomplished fact!!"

Chiropractors in Illinois cannot prescribe drugs, Ill. Rev. Stat., 1975, Ch. 91, § 5(2)(c), so it is not surprising that Dr. Talsky denigrates the use of drugs and urges drugless treatment of illnesses. However, assuming that some illnesses can be treated and cured by chiropractics without the use of drugs, the assertions that chiropractic care will eliminate the need of drugs to cure illness in general and that chiropractic care is essential to good health in all cases, are both misleading and false.

The second theme is that people will live happy healthy lives only if they receive periodic chiropractic care. Dr. Talsky advertises: "If you feel as bad as you do now, how will you feel in 10, 20, 30 years from now? Can you afford to continue patching up symptoms when health is within reach through chiropractic care? IT'S NOT TRUE TO SAY . . . We are doing everything possible UNLESS CHIROPRACTICS IS INCLUDED." In another advertisement there are contrasting pictures of a healthy child and an obviously sick and starving child captioned "SADNESS TO SUNSHINE" and "SICKNESS TO HEALTH." The assertion is plainly that chiropractic care will insure good health.

The state of the medical arts today makes it impossible for any health professional to promise health and happiness. Conversely, it is patently false to suggest that one will be on his knees suffering because his child was born with a birth defect as a result of his failure to know about

chiropractic care. Dr. Talsky's advertisements, which promise that health and happiness result from chiropractic care and misery results if such care is ignored, are patently false and certainly misleading. They are therefore outside the zone of First Amendment protection. *Bates,* 433 U.S. at 383; *Virginia Citizens,* 425 U.S. at 771.

Dr. Talsky's advertisements are further removed from the zone of First Amendment protection by the nature of the profession involved and the context of the advertisements. Medical professionals, by definition, deal in an area where individuals are peculiarly susceptible to alluring promises of physical relief. *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 612 (1935). The irreparable damage that can be suffered by an individual who is misled by the advertisements of medical professionals serves to narrow the leeway permitted such professionals in advertising their services. *Bates,* 433 U.S. at 383. If puffery is ultimately condoned in some professional advertising, that condonation should not be extended to the advertisements of medical professionals. As this Court noted in *Bates,* different degrees of regulation may be appropriate in different areas. 433 U.S. at 383, n. 37. In the medical area, the danger of such advertising is that it may generate a demand for unneeded medical attention or may convince the unwitting that a particular type of medical treatment is called for to the exclusion of another type that may be needed.

The second factor that further removes Dr. Talsky's advertisements from the zone of First Amendment protection is the context in which it appears. Even if it could be argued that Dr. Talsky's statements might not be false and misleading, they appear in a context utilizing all of the hucksterism known to the advertising trade. Dr. Talsky utilizes testimonials from individuals ostensibly aided by

chiropractic care when fully licensed physicians were unable to help. Dr. Talsky engages in glittering generalities ("Sadness to Sunshine, Sickness to Health") and attempts to generate a bandwagon effect of individuals rushing to obtain chiropractic services. Dr. Talsky offers free chicken and free X-rays in an effort to generate demand for a particular type of health service. The context in which Dr. Talsky's various statements regarding the efficiency of chiropractic care removes any vestige of doubt that they are entitled to the protection of the First Amendment.

The decision of the Illinois court can also rest on the conclusion that Dr. Talsky's advertisements could have been prohibited by properly drawn restrictions on the time, place and manner of his advertisements. The court held that:

> [I]t is further evident that the attachment of even protected advertising material to traffic-light posts, traffic-control boxes and United States mail boxes would constitute an improper time, place and manner for the advertising of professional services under those uses. 68 Ill. 2d at 594, 370 N.E. 2d at 180.

Prior decisions of this Court clearly evidence the accuracy of the Illinois court's conclusion. *Bates,* 433 U.S. at 383; *Virginia Citizens,* 425 U.S. at 771; *Grayned* v. *City of Rockford,* 408 U.S. 104, 116 (1972).

Whatever this Court ultimately determines to be the permissible scope of advertising that can be engaged in by medical professionals, it is beyond doubt that Dr. Talsky's advertisements are outside that scope and can be prohibited by state regulation. Therefore, the Illinois court's refusal to consider the constitutionality of the Illinois restrictions on advertising by physicians and chiropractors was correct. Dr. Talsky's advertisements are beyond the pale of First Amendment protection and he therefore has no standing to challenge the constitutionality of the Illinois statute.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPPLEMENT

SUPPLEMENT

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

STATE STATUTES INVOLVED

Ill. Rev Stat., 1975, Ch. 91, § 16a

> The Department may revoke, suspend, place on probationary status, or take any other disciplinary action as the Department may deem proper with regard to the license, certificate, or state hospital permit of any person issued under this Act or under any other Act in this State to practice medicine, to practice the treatment of human ailments in any manner or to practice midwifery, or may refuse to grant a license, certificate, or state hospital permit under this Act or may grant a license, certificate, or state hospital permit on a probationary status subject to the limitations of the probation, and may cause any license or certificate which has been the subject of formal disciplinary procedure to be marked accordingly on the records of any county clerk upon any of the following grounds:
>
> • • •
>
> 4. Engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud, or harm the public;
>
> • • •
>
> 13. Except as otherwise provided in Section 16a-1, advertising or soliciting, by himself or through another, by means of handbills, posters, circulars, stereoptican slides, motion pictures, radio, newspapers or in any other manner for professional business;